Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of BellSouth Telecommunications, Inc.	)	
For Forbearance Under 47 U.S.C. § 160(c) From	)	WC Docket No. 04-405
Application of *Computer Inquiry* and Title II	)	
Common-Carriage Requirements	)	

AT&T's REPLY COMMENTS TO PETITION FOR FORBEARANCE OF BELLSOUTH TELECOMMUNICATIONS, INC.

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Pursuant to the Commission's Public Notice in the above-captioned docket, AT&T Corp. ("AT&T") hereby submits these Reply Comments to BellSouth Telecommunications, Inc.'s ("BellSouth's") petition seeking forbearance from enforcement of Title II common carriage requirements and the *Computer Inquiries* rules (the "Petition").[1]

I. INTRODUCTION AND SUMMARY

BellSouth's Petition seeks unprecedented relief that has never been granted to *any* common carrier, regardless of the amount of competition it may face. The comments fully confirm AT&T's showing that the sweeping deregulation BellSouth seeks cannot be

[1] *Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. § 160(c) From Application of Computer Inquiry and Title II Common-Carriage Requirements*, Docket No. 04-405, DA No. 04-3507, (filed October 27, 2004) (the "Petition") .

justified under any rational interpretation of the stringent requirements of Section 10. Indeed, they show that granting the application – and turning access to virtually all of BellSouth's facilities above a few voice-grade equivalents into "private carriage" – would seriously imperil the continuation of the vigorously competitive market needed to develop and nurture innovative, robust, and low-cost broadband applications and Internet access services.

Critically, the ILECs' support for the Petition consists of nothing more than a repetition of their "regulatory parity" mantra that is not supported by the necessary detailed evidence, which requires data regarding competition for specific services in specific *local* markets. Moreover, to the extent they provide information at all, the ILECs' supporting "data" at most show the existence of duopoly retail competition in *some* markets for *some* customers. In sharp contrast, the non-ILEC commenters remind the Commission that both court and Commission precedent have clearly recognized that the existence of a duopoly market is insufficient to support competition and the unprecedented deregulation BellSouth seeks, especially given the overwhelming evidence of its (and the other ILECs') dominance over the *only* broadband transmission facilities that are practically available to many competitive broadband providers.

Given the enormous scope of the relief BellSouth seeks, granting the Petition would not only jeopardize the development of a competitive broadband market, it would also threaten competition in the market for traditional services. In particular, it would lead to the total deregulation of the last-mile BellSouth facilities that competitive carriers need as essential inputs to a wide variety of traditional basic telecommunications services, particularly services for small business and enterprise customers. Recognizing

the significant threats the Petition poses to competition and customers, the comments fully support AT&T's demonstration that elimination of the core requirements of Title II and the *Computer Inquiries* rules is simply not permissible under Section 10. In Part II below, AT&T's reply shows that the comments refute any notion that there is a rational basis to create a broadband exemption from the core non-discrimination provisions of Title II or the *Computer Inquiries* rules. Part III demonstrates that there is no basis to find that Section 10 permits the Commission to forbear from these requirements, which are necessary to assure that both wholesale and retail broadband customers will have access to services on just, reasonable and non-discriminatory terms and conditions; that consumers will be protected; and that the public's interest in competition is preserved.

II. THE COMMENTS SUPPORT AT&T'S SHOWING THAT THERE IS NO RATIONAL BASIS FOR CREATING A BROADBAND EXEMPTION FROM THE CORE NON-DISCRIMINATION OBLIGATIONS IMPOSED BY EITHER TITLE II OR THE *COMPUTER INQUIRIES*.

BellSouth's Petition requests that the Commission broadly forbear from enforcing the core non-discrimination obligations of both Title II and the *Computer Inquiries* regime. Independent ISPs, voice over Internet Protocol ("VoIP") providers, and competing carriers all concur with AT&T that this request seeks unprecedented relief that has never been afforded to *any* carrier, and the ISP commenters in particular show that if such relief were granted to dominant ILECs such as BellSouth, it would render all meaningful competition in the provision of broadband information and advanced services

utterly impossible.[2] The comments thus demonstrate that the Commission cannot forbear from enforcing either of these independent non-discrimination obligations.

A. There is No Basis for Any "Broadband" Exemption from the Nondiscrimination Obligations of Title II.

BellSouth's Petition seeks extraordinary and unprecedented relief that would strip away *all* of the core protections of Title II of the Communications Act with respect to all broadband services subject to the extraordinarily broad definition proposed by BellSouth, *i.e.*, all services and facilities merely "capable of" transmitting at least 200 kbps in one direction. In seeking a blanket exemption from the obligations imposed by Title II --

[2] Indeed, many commenters note the serious implications of this docket for competition in the provision of broadband and information services. Comments of Association for Local Telecommunications Services ("ALTS") at 8 ("[S]hould the Commission grant BellSouth the relief requested in this proceeding, BellSouth will have the ability to shut off access to nonaffiliated VoIP providers, decimating a nascent industry that would otherwise bring low cost, innovative new services to consumers and small businesses"); Comments of CSS Computer Sales & Services, Inc. ("CSS Computer") at 1 ("if BellSouth's request is granted, we could be put out of the ISP business"); Comments of FDN Communications, Inc. and Pac-West Telcom, Inc. ("FDN") at 29 ("This case … threatens to eliminate the *only* available avenue for ISP access")(emphais in original); Comments of Information Technology Association of America ("ITAA") at 2 ("If the Commission grants BellSouth's petition, the ILECs will have the legal right to *refuse* to provide broadband telecommunications services – including special access services – to non-affiliated ISPs….a decision by an ILEC not to provide broadband telecommunications to an ISP – or to provide it on discriminatory prices, terms, and conditions – would make it literally *impossible* for many ISPs to provide competitive broadband information services")(emphases in original); Comments of Kinex Networking Solutions, Inc. ("Kinex") at 8 ("To give [ILECs] forbearance now will only reduce their incentive to build out fiber, will put small ISPs out of business, reduce creativity and innovation, and reduce customer choices and therefore customer satisfaction"); Comments of RAD-INFO, Inc. ("RAD-INFO") at 2 ("[W]ith this docket, BellSouth is asking to all but eliminate the ISP industry"); Comments of Vonage ("Vonage") at 2 (noting "BellSouth's remarkably candid request that it be permitted to discriminate in favor of its own ISP and information services, and against independent providers, and to cross-subsidize its own operations, in light of the obviously harmful impact such discrimination would have on the still nascent IP-enabled marketplace").

including those prohibiting unjust and unreasonable practices (section 201) and discrimination (section 202), and those providing for privately-initiated causes of action for damages for violations of the Act (sections 207-09) -- BellSouth demands the unprecedented legal right to *refuse altogether* to provide basic last-mile broadband transmission -- including special access services -- to non-affiliated carriers and non-affiliated broadband service and application providers ("non-affiliated broadband providers").

Predictably, the handful of ILEC commenters that support BellSouth ignore the audaciously sweeping scope of BellSouth's forbearance request, seeking instead to cast it as a request for routine and long overdue relief.[3] But the ILECs never address -- much less justify -- the enormous scope of the Petition. Nor do they dispute the fact that BellSouth is seeking the Commission's permission to *discriminate at will* against all non-affiliated competitors (if and when it chooses to deal with those parties at all on a "private-carriage" basis) in the provision of last-mile broadband transmission services, and to deny non-affiliates any recourse under the Title II complaint processes. Instead, the ILECs merely repeat BellSouth's unsupported claims, do not attempt to identify legitimate grounds for granting such truly exceptional relief, and offer no reason why the Commission should grant relief here that it has never previously given to *any* common carrier at *any* time, regardless of whether the carrier was dominant or non-dominant. There is simply no record support here or in any other Commission proceeding that

[3] *See, e.g.*, Comments of Qwest Corporation ("Qwest") at 4-6; Comments of SBC Communications, Inc. ("SBC") at 1-2; Comments of Verizon ("Verizon") at 1-2.

warrants the granting of such anti-competitive prerogatives to *any* common carrier, much less a dominant ILEC such as BellSouth.

In sharp contrast to the ILECs' complaints about the lack of "regulatory parity," the comments of independent ISPs, competing carriers and other parties all support AT&T's showing that the relief BellSouth requests is so ill-defined and unbounded in scope -- and so extreme -- that it would undoubtedly permit the ILECs to discriminate against competing providers in continually unforeseen and increasingly harmful ways. For example, Vonage[4] showed that the proposed relief would even allow ILECs to abuse their market power over such vital facilities as the 911 infrastructure to discriminate against independent VoIP providers by preventing them from developing optimal 911 solutions for their customers. And these anticompetitive opportunities are real, not theoretical. As Vonage showed, SBC recently sought to strip 911 access that is essential to interconnect VoIP providers out from an interconnection service SBC disingenuously claimed was "tailored" to benefit competing VoIP providers.[5] Thus, taken at face value, the relief sought by BellSouth is so unconstrained that it would allow ILECs to abuse their market power over vital safety functions at the expense of both competitive broadband service providers and telecommunications consumers. No ILEC commenter

[4] Vonage at 7-9; *see also* Comments of National Association of Telecommunications Officers and Advisors; National League of Cities; U.S, Conference of Mayors; Texas Coalition of Cities For Utilities Issues; Greater Metro Telecommunications Consortium; Metropolitan Area Communications Commission; Mt. Hood Cable Regulatory Commission; City of Eugene, Oregon; and Montgomery County Maryland (the "Local Government Coalition") at 21-22 (asserting that BellSouth must, at a minimum, show that public policy interests protected by, *inter alia*, 911 service requirements would not be harmed if the Petition were granted).

[5] Vonage at 8 (discussing SBC's failure to include 911 access in its recent TIPTop interconnection service).

even attempted to explain how the Commission could grant ILECs permission to discriminate against competitors -- and harm consumers -- in this way (or in any other way that the ILECs can conceive of now or in the future) and remain consistent with its duty to safeguard the public interest.[6]

Ignoring all of these facts, the ILEC commenters[7] merely parrot BellSouth's mantra in the Petition that Title II common carrier regulation is no longer necessary because the ILECs are subject to "vigorous intermodal competition."[8] But they, as BellSouth, ignore the fact that such competition, even where it exists, is at most a shared duopoly with cable providers in some retail markets and that there are virtually no options *at all* available in the wholesale market for key broadband transmission services. And they further ignore that wholesale access to the ILECs' basic broadband services is critical to the development and maintenance of a competitive retail market for broadband information services and applications.[9]

In contrast, independent ISPs, competing carriers and other commenters agree with AT&T (at 12-13, 26-31) that the Commission may not forbear from enforcing the essential Title II requirements that the ILECs provide non-affiliated providers with just,

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[6] In addition, the Local Government Coalition (at 18) explained that the relief requested by the Petition is so extreme and vague that it appears to relieve BellSouth of the Section 222 obligation to protect the privacy rights of carriers and customers. No ILEC commenter attempted to justify this relief either.

[7] *See, e.g.*, Qwest at -4; SBC at 1-2; Verizon at 1.

[8] Petition at 18.

[9] Opposition of Computer Office, Inc. ("Computer Office") at 3; FDN at 22-23; Opposition of Federation of Internet Solution Providers of the Americas ("FISPA") at 16; Comments of Southeast Telephone, Inc. and Kentucky Internet Service Providers Association ("Southeast Telephone") at 6; Vonage at 3.

reasonable and non-discriminatory access to the basic broadband telecommunications services because doing so would directly violate Section 10 of the Act.[10] Section 10 is the Commission's sole source of forbearance authority,[11] and on its face forbids the Commission from forbearing the enforcement of any statutory provision that is necessary to ensure that a carrier's charges or practices are just and reasonable and not unreasonably discriminatory.[12] In particular, the commenters supported AT&T's showing (at 12-15) that the principal purpose of Sections 201 and 202 (and the related provisions of Title II necessary to implement those requirements, such as the complaint procedures established by Sections 207 and 208) is to enforce exactly those obligations.[13]

Continued application of Sections 201 and 202, as well as the related Title II provisions, is clearly necessary to prevent the ILECs from acting unjustly and unreasonably toward, and discriminating unreasonably against, non-affiliated providers. As AT&T and other competing providers showed,[14] there is indisputable evidence that the ILECs, including especially BellSouth, will in fact discriminate in the provision of wholesale telecommunications services against firms that offer competitive services in

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[10] See, *e.g.*, Local Government Coalition at 5-6; FISPA at 23-24; Comments of MCI, Inc. ("MCI") at 7-10; ITAA at 9-10; Vonage at 12, 22-24.

[11] *See ASCENT v. FCC,* 235 F.3d 662, n.7 (D.C. Cir. 2001) (recognizing the Commission's conclusion that Section 706 of the Telecommunications Act is not an independent basis of forbearance authority).

[12] 47 U.S.C. § 160(a)(1).

[13] *See, e.g.*, ITAA at 9-10; FDN at 41.

[14] *See, e.g.*, AT&T at 38-40; FDN at 22-23; 30-31; ITAA at 16-17; Joint Comments of Time Warner Telecom, Cbeyond Communications and XO Communications ("Time Warner" at 13-14); Vonage at 14-15.

"downstream" markets. This has been confirmed by the Commission's own recent conclusion in a Section 208 complaint proceeding that BellSouth unlawfully discriminated in the provision of special access service -- an essential input for data-intensive long distance services provided to enterprise customers -- by offering greater discounts to its own long-distance affiliate than to non-affiliated competitors.[15] The commenters provided additional evidence that other ILECs, such as Verizon, also discriminate against potential competitors in the downstream enterprise data market.[16] And smaller independent ISPs documented ILEC discrimination in the provision of broadband transmission (including xDSL transmission) that effectively excluded them from downstream broadband markets.[17] The record thus provides irrefutable evidence that ILECs will seize upon *any* opportunity to discriminate in the provision of wholesale inputs to competitors in "downstream" retail markets of all descriptions, including the information and broadband services markets. Given such evidence, the Commission may not forbear from enforcing the core provisions of Title II with regard to the ILECs' basic

[15] *See, e.g.,* AT&T at 38-40; ITAA at 16-17; Time Warner at 17 (*citing AT&T Corp. v. BellSouth Telecommunications, Inc.,* Memorandum Opinion and Order, FCC 04-278, EB-04-MD-010 (Dec. 9, 2004)).

[16] *See* Time Warner at 14 ("Not surprisingly, Verizon has attempted to leverage its control over special access inputs… to harm Lightpath's ability to compete in downstream retail enterprise service markets").

[17] *See* Southeast at 7-8 (citing Kentucky Public Service Commission's reprimand of BellSouth for having a wholesale tariff that "provided preferential and discriminatory service to itself to the detriment of other customers, specifically the small ISPs") (citations omitted); *see also* Comments of California ISP Association, Inc. ("California ISPs") at 9 ("Recently, an SBC representative stated that 'If [SBC] is going to build the [Internet Protocol] pipe, we want all the revenue stream.' This statement reflects an ongoing intent to exclude independent ISPs from ILEC networks.")

broadband transmission services. [18]

Moreover, and of particular moment, the other commenters support AT&T's showing[19] that the Commission's own precedent independently demands that it deny the Petition, *regardless of the Commission's judgment of the ILECs' claims regarding broadband competition*. While the ILEC commenters make wildly exaggerated claims about "vigorous" competition in the retail broadband market -- and completely false claims of "vigorous" competition in the wholesale broadband market -- they are actually not probative here. In fact, the Commission has *never* forborne from applying core Title II obligations -- even to non-dominant telecommunications carriers that lack market power (a class to which BellSouth now claims to belong) -- merely because they face competition.[20] The reason for this is simple: the core obligations of Title II are so important to sustainable competition and the public interest that the Commission has *always* applied those obligations to *all* telecommunications common carriers, even when those non-dominant carriers face the stiffest of competition.

Even in proceedings in which the Commission has found carriers non-dominant and that market competition generally could be relied on to produce cost-based and non-

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[18] *See ASCENT v. FCC,* 235 F.3d at 666 (Commission may not "circumvent" the limitations on its forbearance authority based on a determination that the "advanced services" market is competitive). Thus, contrary to BellSouth's assertion, *see* Petition at 29-30, the Commission may not allow a common carrier to provide telecommunications service on a private carrier basis merely because the Commission determines the market is competitive. *See NARUC v. FCC,* 525 F.2d 630, 644 (D.C. Cir. 1976) (The Commission does not have "unfettered discretion . . . to confer or not confer common carrier status on a given entity, depending on the regulatory goal its seeks to achieve").

[19] *See, e.g.*, AT&T at 16-18; FDN at 41-42 (citing *Motion of AT&T Corp. To Be Reclassified As A Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271, ¶ 3 (1995).

[20] *See, e.g., id.*

discriminatory rates, it has always relied on the continuing application of sections 201 and 202 (together with the section 207-209 complaint processes) as a backstop to remedy potential abuses. Thus, in the markets for interexchange services and mobile services, which the ILECs themselves regularly tout as vigorously competitive, the Commission continues to enforce the obligations of Title II on *all* carriers, whether they are dominant or non-dominant.[21] Accordingly, even if the ILEC commenters' rhetoric regarding competition were true (and much of it clearly is not), it cannot provide a legitimate basis to relieve BellSouth or the other ILECs of their core Title II obligations.

The comments further confirm AT&T's showing that continued enforcement of the core provisions of Title II -- which is compelled by the record here -- *independently* requires continued enforcement of the core *Computer Inquiries* requirements.[22] Section 202(a) prohibits carriers -- both dominant and non-dominant -- from engaging in "unjust or unreasonable discrimination" in the provision of a telecommunications service.[23] Numerous commenters showed[24] that the Commission has repeatedly held that this provision imposes an *independent* obligation -- separate from those in the *Computer Inquiries* rules -- that requires *all* facilities-based carriers that provide information services to (i) offer the transmission capacity used to provide their information services on a stand-alone basis and (ii) make that capacity available to competing ISPs on a non-discriminatory basis.

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[21] *See, e.g.*, AT&T at 16-18; FDN at 41-42; FISPA at 25 & n.18; ITAA at 11 & n.32.

[22] *See, e.g.*, AT&T at 16-17; Southeast at 9; ITAA at 9-10.

[23] 47 U.S.C. § 202(a).

[24] *See, e.g.*, AT&T at13; Southeast at 9; ITAA at 9-10.

Thus, in the *Interexchange Marketplace Reconsideration Order*, the Commission observed that "section 202 of the Act prohibits [facilities-based carriers] from discriminating unreasonably in [the] provision of basic services" to non-affiliated ISPs.[25] Similarly, in the *Frame Relay Order*, which held that the *Computer II* rules required AT&T to unbundle its basic frame relay service, the Commission recognized that "Section 202 of the Act *also* prohibits a carrier from discriminating unreasonably in its provision of basic services."[26] And, as AT&T's comments showed,[27] in the more recent *CPE/Enhanced Service Bundling Order*, the Commission reiterated that "all carriers have a firm obligation under section 202 of the Act to not discriminate in their provision of transmission service to competitive internet or other enhanced [information] service providers."[28] The Commission further recognized that "discrimination . . . that favor[s] one competitive enhanced service provider over another or the carrier, itself, [is also] an unreasonable practice under section 201(b) of the Act."[29] Thus, when the Commission determines that it cannot forbear from enforcing Title II against ILECs providing broadband services -- as the record compels it to do -- the Commission must also necessarily conclude that it must continue to enforce the core substantive requirements

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[25] *Competition in the Interstate Interexchange Marketplace*, Memorandum Opinion and Order On Reconsideration, 10 FCC Rcd 4562, 4580 & n.72 (1995).

[26] *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling That AT&T's InterSpan Frame Relay Service Is a Basic Service*, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13719 (1995) (emphasis added).

[27] AT&T at14; *see also* ITAA at 10-11.

[28] *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report and Order, 16 FCC Rcd 7418, 7445 (2001).

[29] *Id.* at 7445-46.

imposed by the *Computer Inquiries* with respect to the ILECs' provision of those same services.

The commenters also explained in detail why the Commission must reject BellSouth's claim that Part 64 cost allocation rules and Title II tariffing requirements are no longer needed.[30] ILECs dominate the "upstream" wholesale broadband transmission market and compete in the "downstream" retail broadband service markets. Thus, ILECs have every incentive -- and the indisputable ability -- to subsidize unregulated retail broadband services with their regulated broadband offerings.[31] The comments showed that Part 64, together with the supporting tariffing requirements of Title II, are perhaps the most important regulatory safeguards that inhibit the ILECs' ability to use cross-subsidies to distort competition and consumer choice in the broadband service markets.[32]

The commenters also plainly showed that Commission's adoption of the current price cap regime does not, as BellSouth suggests,[33] obviate the need for Part 64 cost allocation. To the contrary, when the Commission adopted the price cap regime in 1990, it recognized that ILECs would *retain* incentives to allocate joint costs improperly in order to cross-subsidize their more competitive non-regulated offerings, such as information services.[34] And as MCI showed, even under price caps ILEC rates continue

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[30] *See, e.g.*, MCI at 12-14. Title II tariffing requirements supplement and reinforce Part 64 cost allocation rules by requiring specific cost support for individual regulated and tariffed services.

[31] *See, e.g.*, Computer Office at 15-16; Opposition of computers-N-Service Internet ("C-N-S Internet") ¶ 12.

[32] *See, e.g.*, Computer Office at 15; MCI at 12; ITAA at 17.

[33] Petition at 23.

[34] *See, e.g.*, FDN at 29-31; FISPA at 45-46; ITAA at 17; MCI at 14.

to be linked to costs, and ILECs retain incentives to misallocate exogenous costs to artificially boost price cap indices.[35] Moreover, such increases can be, and in the past have been, substantial.[36] Thus, the Commission clearly must continue to enforce the Part 64 rules to "police any LEC attempts to engage in predation or cross-subsidization."[37]

The commenters[38] also disproved BellSouth's claim that Part 64 cost allocation rules impose any extraordinary or unjustified burdens. Neither BellSouth nor any other ILEC sought to quantify their Part 64-related costs, but in all events, the commenters showed that Part 64 rules are more than justified by their related consumer benefits and their usefulness in preventing economically harmful cross-subsidy.[39] Indeed, the Commission's own Wireline Competition Bureau reaffirmed just this month that the Part 64 rules "remain necessary, and therefore should not be eliminated or modified as a result of meaningful competition at this time" and stated its assessment that "[t]he rules are not onerous or otherwise burdensome."[40] The Wireline Competition Bureau emphasized that "[a]s competition and deregulatory actions are realized…the separation of costs become *more* significant and meaningful in determining the reasonableness of regulated

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[35] MCI at 13.

[36] *Id*.

[37] *Policy and Rules Concern Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, 6791 (1990).

[38] *See, e.g.*, FDN at 29-31; FISPA at 45-46; ITAA at 17; MCI at 14.

[39] See, e.g., *id.*

[40] WC Docket No.04-179, Wireline Competition Bureau Federal Communications Commission Biennial Regulatory Review, Staff Report, January 5, 2005, at 57.

rates…"[41] Thus, the comments clearly show[42] that BellSouth and the ILECs are precisely *wrong* that there is no need for continued enforcement of Part 64 cost allocation rules.

Finally, the comments resoundingly demonstrate that the Commission should not forebear from enforcing Title II obligations that are designed to promote public policy objectives.[43] Even other Bell companies have conceded these public policy objectives are "important" and must be enforced.[44] In particular, the comments show that the BellSouth and other ILECs must not be permitted to avoid their universal service fund ("USF") obligations relating to broadband services,[45] because allowing a dominant carrier such as BellSouth to avoid USF obligations would make effective and equitable USF reform impossible.[46] Moreover, the Commission has already determined that maintaining the status quo regarding USF contributions based on the provision of broadband services is in the public interest until the Commission has made a final determination regarding USF reform.[47]

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[41] *Id*. (emphasis added).

[42] *See, e.g.*, AT&T at19-20; Computer Office at 15; ITAA at 17.

[43] These include requirements imposed by section 222 (privacy of information); section 229 (ensuring communications assistance for law enforcement officials; sections 255 and 251(a)(2) (imposing requirements that enable persons with disabilities to have access to the telecommunications network); and 47 C.F.R. § 20.18 (ensuring the availability of 911 and E911 services to promote public safety).

[44] WC Docket No. 04-29, SBC Petition, at 2.

[45] *See, e.g.*, Local Government Coalition at 22, 23 & n.38; MCI at 14-15; Comments of The Nebraska Rural Independent Companies ("Nebraska Rural Companies") at 8-9;Comments of National Telecommunications Cooperative Association ("NTCA") at 2-3.

[46] *See, e.g.*, MCI at 14-15.

[47] *Id*.

B. There is No Basis for Any "Broadband" Exemption from the *Computer Inquiries* Nondiscrimination Obligations.

The comments also confirm AT&T's demonstration that the Commission cannot grant BellSouth's request to carve out a "broadband" exemption to the existing *Computer Inquiries* obligations imposed on ILECs.[48] The comments amply show that there has been no technological or economic development that alters the need to continue the existing *Computer Inquiries* requirements with respect to broadband -- or narrowband -- information services. Thus, there is no rational basis for the exemption BellSouth seeks.

The non-ILEC commenters agree with AT&T[49] that the core *Computer Inquiries* nondiscrimination requirements flow from one simple fact -- the Commission's recognition that ILECs possess monopoly control over "key inputs" that non-affiliated broadband service providers need in order to offer information and advanced services, especially "last mile" broadband transmission facilities. The Commission imposed the *Computer Inquiries* nondiscrimination requirements because it correctly recognized that ILECs have both the incentive and the ability to use their market power over basic service inputs to discriminate against rivals in "downstream" information services markets -- and thus to impede information services competition -- unless they are subject to appropriate regulation.[50] As the commenters showed, the Commission properly

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[48] Petition at 17-29.

[49] *See, e.g.*, AT&T at 13-14; California ISPs at 3-4; MCI at 1-2; Vonage at 11-12.

[50] The Commission's *Computer II* decision, *see* Final Decision, Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384 (1980), ("*Computer II*"), adopted two main regulatory mechanisms. First, the Commission recognized the need for "a mechanism whereby non-discriminatory access can be had to basic transmission services by all enhanced service providers." *Id.* ¶ 231. Accordingly, the Commission mandated that common carriers that own transmission facilities and provide

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concluded that "[i]f an incumbent LEC could "den[y] access" to "basic transmission facilities" it could "create a bottleneck in the supply of enhanced services" that "could produce a tendency to monopoly by forcing competitors of the carrier's [ISP] affiliate to leave the market or by persuading potential entrants that the extraneous risks of participation are too great."[51] And as the Commission prophetically observed, "[a]s we evolve into more of an information society, the access/bottleneck nature of the telephone local loop *will take on greater significance*."[52]

The comments abundantly confirm that nothing has changed in the marketplace that could conceivably justify weakening the core *Computer Inquiries* obligations.[53] The

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enhanced services must unbundle their basic from their enhanced services and offer transmission capacity to other enhanced service providers "under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations." *Id*. ¶ 219. Second, the Commission required the largest incumbent local carriers (the Bells and GTE) to provide their information services through affiliates that were structurally separate from the entity providing basic common carriage services. *Id*. ¶ 229. In the *Computer III* decision, the Commission relieved the largest ILECs from the separate affiliate requirement but reaffirmed that the core *Computer Inquiries* non-discrimination requirements apply to *all* carriers, whether dominant or non-dominant, just as the non-discrimination obligations of Sections 201 and 202 apply to all carriers. *Computer III*. *See* Amendment of Section 64.702 of the Commission's Rules and Regulations – Phase I, Report and Order, 104 FCC Rcd 958 (1986) ("*Computer III*"), ¶¶ 100-265.

[51] *Id*. ¶ 208.

[52] *Id*. ¶ 219 (emphasis added).

[53] *See, e.g.,* Computer Office at 3 ("[W]e provide High Speed Internet Access and other enhanced services to customers throughout these [Southeastern states]. All this has been possible due to markets created and maintained through the application of the Telecom Act of 1996, *Computer II/III* and Title II regulation"); FISPA at 16 ("The Internet thrives and broadband technology is deployed because the underlying transmission networks and standards are open and have been open to competitive pressures that stimulate network providers, like BellSouth, to innovate. This 'openness' is a result of Title II and *Computer Inquiry* regulations") Southeast Telephone at 6 ("the Computer Inquires

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independent ISPs, VoIP providers, competing carriers, and trade and government representative commenters[54] all attest to the ILECs' continuing market power over the last-mile broadband transmission facilities that non-affiliated competitors need to compete in "downstream" retail broadband markets. As one ISP group succinctly put it, "ISPs *must* purchase DSL [broadband transmission] from ILECs if they wish to compete with ILEC-affiliated ISPs."[55] Despite the ILECs' poorly supported claims to the contrary, ILEC facilities remain the *primary* means for ISPs, VoIP providers, and other broadband service providers to obtain access to last-mile wholesale broadband transmission.[56] This remains true because, as explained in greater detail in Section III below, the ILECs' networks remain the predominant source of the wholesale broadband access available to provide retail broadband services to end user customers.[57] As MCI (at 6) notes, "There is no other network or technology [currently] capable of proving

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obligations are necessary for the same reason they were necessary at their inception – to ensure a level playing field…")..

[54] *See, e.g.*, MCI at 2-3; Comments of CompTel/Acsent ("CompTel/Acsent") at 13; ITAA at 5-7; FISPA at 28-43; Local Government Coalition at 15; Vonage at 13-14.

[55] California ISPs at 7 (emphasis added).

[56] *See, e.g.*, FISPA at 54 ("The ISPs' *survival* depends on access from the ILEC and to that end, rel[ies] on the safeguards of Title II and Computer Inquiry") (emphasis added); MCI at 6; ITAA at 6("[I]n most cases, ISPs have *no viable alternative* but to obtain this [wholesale broadband transmission] service from an ILEC") (emphasis added).

[57] *See, e.g.*, California ISPs at 6 ("DSL is available over existing telephone lines, which interconnect virtually all businesses and households. At this time, similar ubiquitous networks do not exist for cable or wireless services in California"); CompTel/ASCENT at 13; MCI at 6. Even Frontier, an ILEC, admits that wholesale broadband transmission is "something that cable television companies rarely provide, and only then when they can negotiate mutually acceptable business terms and conditions." Comments of Frontier and Citizens Communications ("Frontier") at 4.

broadband services that can match the ubiquity of incumbent LEC facilities." Thus, the comments unambiguously demonstrate that if the Commission were to eliminate the ILECs' obligation to provide non-discriminatory access to broadband transmission, those competitive providers would be wholly at the mercy of market power-wielding ILECs that have both the incentive and ability to abuse such power -- the very anticompetitive outcome that the core *Computer Inquiries* rules were designed to prevent.

Simply put, despite changes in the specific technologies used to provide broadband transmission, ILECs retain their market power over the facilities needed to provide such transmission by virtue of their control over their ubiquitous loop and other high-speed transmission facilities. And non-affiliated broadband providers cannot compete without non-discriminatory access to those facilities. Thus, the comments confirm AT&T's showing that there is has no rational basis upon which the Commission could lawfully create a broadband exemption from the core *Computer Inquiries* non-discrimination obligations for ILECs.

III. THE COMMENTS SUPPORT AT&T's SHOWING THAT BELLSOUTH HAS NOT REMOTELY SATISFIED THE REQUIREMENTS FOR FORBEARANCE UNDER SECTION 10

The non-ILEC parties' comments confirm AT&T's initial showing (at 26-48) that the Petition is patently insufficient, both procedurally and substantively,[58] and that applicable law requires that the Petition be denied on its face.

[58] *See, e.g.*, CompTel at 1-3; Comments of EarthLink, Inc. ("EarthLink") at 15; FDN at 12; Local Government Coalition at 14.

As a threshold matter, the non-ILEC commenters concur with AT&T's explanation of the baseline requirements of Section 10: the proponent of forbearance must make three "conjunctive" showings,[59] and the Commission *must* "deny a petition for forbearance if it finds that *any one* of the three prongs is unsatisfied."[60] They also concur that because these criteria focus on the protection of competition and consumers the Commission must examine *detailed empirical evidence* concerning *specific market conditions* that apply to the particular regulations and services at issue as part of a painstaking analysis of market conditions that is supported by empirical evidence.[61]

The commenters also explain that the Petition is fatally deficient in this regard, because it fails to provide *any* of the evidence the Commission needs to make the mandatory market analysis. [62] *First*, they recognize that the Petition fails to meaningfully define the geographic markets where BellSouth seeks relief and provides no data that

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[59] *See, e.g.*, EarthLink at 11; FDN at 11; Vonage at 9-11; *see also*, *CTIA* v. *FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) (emphasis added). The first prong requires the proponent to show that enforcement of the identified regulations to the specific services at issue "is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and not unjustly or unreasonably discriminatory." 47 U.S.C. § 160(a)(1). The second prong requires the proponent to show that enforcement of those regulations "is not necessary for the protection of consumers."[59] The third prong requires the proponent to must show that non-enforcement of those regulations "is consistent with the public interest," i*d.* § 160(a)(3), and, in particular, that such non-enforcement will "promote competitive market conditions" and "enhance competition among providers of telecommunications services." *Id.* § 160(b).

[60] *See, e.g.*, EarthLink at 11; FDN at 11; Vonage at 9-11.

[61] *See, e.g.*, EarthLink at 11; FDN at 12; Local Government Coalition at 7-10; Time Warner at 6-8.

[62] *See, e.g.*, AT&T at 28-29; EarthLink at 11; FDN at 12; Local Government Coalition at 7-10; Time Warner at 6-8.

could be relevant to defining such markets.[63] The Petition certainly provides reams of data relating to what BellSouth claims are the retail "market shares" of various broadband service providers.[64] But in the end, those data represent nothing more than a hodge-podge of economically meaningless "national share" data that are irrelevant to the Commission's analysis, because the markets for which BellSouth seeks relief are undeniably local.[65] S*econd*, the Petition makes no attempt to meaningfully define the services for which BellSouth seeks forbearance relief. Indeed, other than making a perfunctory reference to digital subscriber line ("DSL") services, the Petition does not specifically identify *any* of the services to which the requested forbearance relief would apply. The commenters thus concur with AT&T that granular data on the relevant service and geographic markets are required before the Commission may grant the forbearance relief BellSouth requests.[66] The Commission must therefore reject the Petition out of hand, because it fails to provide the baseline factual predicates necessary for forbearance.

But even if the Commission were to consider the Petition on the merits, the comments demonstrate that it must reject the Petition on that basis as well. Section 10(a) requires the Commission to "deny a petition for forbearance if it finds that any one of the

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[63] *See, e.g.*, EarthLink at 15; Local Government Coalition at 7-10.

[64] Petition at 7-13.

[65] *See*, AT&T at 28-29; *see also, e.g.*, EarthLink at 16; Local Government Coalition at 10.

[66] *See, e.g.*, ALTS at at 7; EarthLink at 14-16; FDN at 12; Local Government Coalition at 8-10; Time Warner at 6-8.

three prongs [of the statutory forbearance test] is unsatisfied,"[67] and BellSouth's Petition fails to satisfy any of them.

A. The Petition Does Not Meet the Requirements of Section 10(a)(1).

Section 10(a)(1) requires BellSouth to demonstrate that enforcement of the Title II and *Computer Inquiries* requirements are not necessary to ensure just, reasonable, and non-discriminatory rates, terms, and conditions for access to last-mile wholesale broadband facilities. BellSouth did not even make a serious attempt to do so.

As AT&T showed and the other non-ILEC commenters confirm, BellSouth's ceaseless claims regarding (limited) duopolistic competition for *retail* Internet access service simply cannot support its request for relief from core Title II and *Computer Inquiries* obligations that govern the provision of *wholesale* broadband transmission services competing broadband providers need to survive.[68] The comments amply demonstrate that the Title II and *Computer Inquiries* obligations are grounded in the continuing lack of *wholesale* alternatives to the ILECs' network facilities.[69] While BellSouth and its ILEC supporters continually focus on their claim that retail end users of broadband information services may sometimes have an alternative (usually only one at most) for high-speed broadband access, the same is clearly not true for ISPs, VoIP

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[67] *CTIA* v. *FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003).

[68] *See, e.g.*, ALTS at 7-8 ("Again and again, the ILECs point to competition in the retail market to justify deregulation of their wholesale services, when such a direct correlation between those markets simply does not exist"); Time Warner at 16 (BellSouth "confuses *market share* in a downstream market with *market power* in an upstream market") (emphasis in original).

[69] *See, e.g.*, AT&T at 31-38; California ISPs at 5-6; FISPA at 28-43; Local Government Coalition at 15-16; Vonage at 13-14; Washington ISPs at 21-27.

providers and other broadband providers. Those competitors simply cannot survive without just, reasonable and non-discriminatory access to wholesale last-mile broadband transmission.[70] And the comments repeatedly demonstrate[71] that, in the vast majority of cases, non-affiliated providers simply cannot provide broadband information services without access to incumbent LEC last-mile facilities.[72]

The competitive commenters not only show that the ILECs' claims regarding cable as a broadband alternative are false, but they also demonstrate that cable is an inherently inadequate substitute for the ILECs' broadband transmission infrastructure.[73] Thus, regardless of any retail services they may offer, cable companies do not provide adequate wholesale broadband access alternatives to constrain the incumbent LECs' market power over the broadband transmission inputs that non-affiliated broadband providers need to compete. Moreover, the competitive commenters demonstrate that the other intermodal and intramodal "alternatives" that BellSouth and the other ILECs reference are patently inadequate to keep the ILECs' monopoly control over wireline facilities in check.

Cable is an inadequate substitute for the ILECs' wireline facilities - The commenters provide substantial proof that cable modem services cannot constrain the ILECs' dominance over the provision of last-mile wholesale broadband transmission. In

[70] *See, e.g.*, California ISPs at 5-6; MCI at 3; Southeast Telephone at 6.

[71] *See, e.g.*, California ISPs at 5-6; FDN at 24 ("Accordingly, there is no rational basis upon which the Commission could conclude that ISPs have assurances of alternatives to reach customers other than Title II common carrier offerings"); MCI at 3.

[72] *See, e.g.*, California ISPs at 5; FDN at 24; FISPA at 28-30; Local Government Coalition at 16-17; MCI at 3.

[73] *See, e.g.*, AT&T at 32-33; FISPA at 32-33; Washington ISPs at 24-27.

particular, the commenters confirm AT&T's evidence that only a small proportion of businesses receive broadband service from cable providers,[74] and they show that only one out of four businesses is even passed by cable networks.[75] Moreover, the comments provide substantial evidence that business customers do not generally consider cable modem broadband services to be sufficient to meet their business needs. That is because cable modem broadband services are delivered via asymmetrical hybrid fiber coaxial ("HFC") facilities.[76] HFC facilities have limited upstream capacity, so that a high-speed cable service similar to an ILEC's symmetric T-1 service would quickly exhaust the upstream capacity of even an upgraded cable network.[77] This renders cable modem service useless, or at best unsuitable, for many broadband business functions.[78] Unlike the ILECs' wireline facilities, HFC's shared architecture also creates significant potential for service slowdowns (especially in peak business hours) and requires cable operators to place unacceptable bandwidth restrictions on their business users.[79] In addition, the shared architecture raises security concerns that do not arise with ILEC wireline facilities.

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[74] AT&T at 32; *see, e.g.*, FDN at 15 ("In many markets ILEC DSL is the only broadband service available because cable is not typically not available for instance in rural markets and in business markets in all geographic markets"); MCI at 7 ("[C]able modem systems do not serve businesses… Rarely is their service available to business customers"); Local Government Coalition at 14 ([A]ccording to the Commission's most recent figure, fewer than 1% of cable modem subscribers were medium or large business or government entities"); Vonage at 17.

[75] *See, e.g.*, Time Warner at 10.

[76] *See, e.g.*, AT&T at 32-33.

[77] *See, e.g.*, Time Warner at 10 & n.22.

[78] This is reflected in the fact that business customers are often willing to pay 3 times as much for symmetrical DSL services as for comparable asymmetrical DSL services. *See, e.g.*, Time Warner at 13 & n.35.

[79] *See, id.* at 11.

For these and other reasons,[80] cable modem services are not attractive to many business customers, and business customers do not perceive cable modem service as a substitute for ILEC high-speed broadband services.[81] As for retail cable modem services, they are not even ubiquitously available to residential customers.[82]

The commenters also provide other reasons why cable modem services do not offer non-affiliated broadband providers a substitute for ILEC wholesale broadband services. It is undisputed that cable providers do not generally offer wholesale broadband access to independent ISPs.[83] This is at least in part because their networks are not designed to support wholesale common carriage of telecommunications services.[84] In addition, cable networks typically lack the flexibility to allocate bandwidth between carriers as ILEC ATM networks can.[85] And while some progress has been made in developing solutions that would allow multiple ISP access over cable networks, there are no recognized standards for doing so.[86] Thus, non-affiliated broadband providers that

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[80] *See, e.g.*, AT&T at 32-33.

[81] *See, e.g.*, Time Warner at 13.

[82] *See, e.g.*, AT&T at 32.

[83] *See, e.g.*, California ISPs at 5; FISPA at 28-30; ITAA at 6; Washington ISPs at 24-27.

[84] *See, e.g.*, ALTS at 5 ("[W]hile the telephone network was built to provide access to an unlimited number of enhanced service providers and voice customers alike, cable systems have traditionally been closed, used only to carry only the cable companies' video services.") (citations omitted); ITAA at 14; Washington ISPs at 26.

[85] *See, e.g.*, *id.* Such capability might be used to allow a large number of non-affiliated ISPs to efficently share a DSLAM. *See id.*

[86] *See, e.g.*, *id.* This stands in stark contrast to ILEC networks, which have always been designed to provide equal and non-discriminatory access to competing carriers and ISPs, resulting in well-established systems, processes, and rules in place for accomplishing that objective in a commercially viable manner. *See, e.g.*, WC Docket No. 04-416, Opposition of AT&T to Petition of Qwest Corporation For Forbearance Pursuant to 47

(footnoted continued on next page)

wish to serve businesses and many residential customers do not even have the *prospect* of a significant cable-based alternative to the ILECs' wireline wholesale last-mile transmission services.

The commenters also confirm AT&T's showing that even if there were substantial wholesale competition from cable providers (which there is not), the existence of cable companies as possible wholesalers would, at best, represent a *potential* duopoly in the relevant geographic market, which the courts and the Commission have routinely found insufficient to promote vigorous competition.[87] The comments thus clearly establish that the Commission cannot reasonably rely on a broadband services duopoly to accomplish the objectives of the Telecommunications Act, which include the duty to promote competition in broadband services.[88]

The other intermodal and intramodal competition BellSouth cites is utterly insufficient to control the ILECs' market power over the wholesale broadband transmission market - The commenters also provide substantial evidence that none of the other alternatives cited by BellSouth is sufficient, individually or collectively, to provide non-affiliated providers with adequate alternatives or to limit the ILECs' market power. Non-affiliated ISPs, VoIP providers, and other competing broadband service providers simply cannot turn to the owners of wireless or satellite broadband facilities as

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(footnote continued from previous page)

U.S.C § 160(c) Pertaining to xDSL Services, at 18-19 (filed January 5, 2005).

[87] AT&T at 34-35; *see also, e.g.*, EarthLink at 11-12; FDN at 26-28; FISPA at 33; Local Government Coalition at 19-20; Vonage at 13-16.

[88] *See, e.g., id.*

alternatives to the ILECs' last-mile broadband facilities.[89] Fixed wireless broadband access services are extremely costly and only available on a limited basis,[90] and even the leading carriers that have attempted to deploy fixed wireless broadband services describe their efforts as "failures."[91] In addition, wireless broadband carries with it significant capacity and reliability concerns.[92] Similarly, satellite providers do not offer non-affiliated broadband providers a viable alternative because, among other things, they do not provide access to a sufficiently large base of end users; their services are not affordable or sufficiently reliable; they offer unacceptably low upload and download speeds, particularly for business customers; and they do not even support important application such as VoIP.[93] And in all events, neither wireless nor satellite providers generally offer wholesale broadband transmission services to independent ISPs and other competitive broadband service providers.[94]

BellSouth's and the other ILECs' references to broadband over power line ("BPL"), mobile wireless, and WiMAX are equally unavailing, since these alternatives are not commercially available and are completely unproven as reliable sources of

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[89] *See, e.g.*, California ISPs at 5-6; ITAA at 7-8; Local Government Coalition at 16; Vonage at 3, 13-14; Washington ISPs at 22.

[90] *See, e.g.*, FISPA at 41-42; Washington ISPs at 22.

[91] *See* AT&T at 35.

[92] *See, e.g.*, California ISPs at 5-6; FISPA at 39-42; Local Government Coalition at 16; Vonage at 13-14; Washington ISPs at 22-23.

[93] *See, e.g.*, FISPA at 39-40; ITAA at 7; Vonage at 2. *See* also GN Docket No. 04-54, Comments of EchoStar Satellite LLC at 9 ("technologies such as fixed wireless and satellite, combined, make up less than one percent of broadband service lines.")

[94] *See, e.g.*, AT&T at 36; California ISPs at 5; FISPA at 38-42; Washington ISPs at 22-23.

broadband access.[95] As a result, a leading VoIP provider has concluded that "none of these alternative technologies have sufficiently matured to support [its] IP-enabled services."[96]

The comments also confirm that non-affiliated broadband service providers cannot realistically turn to competitive wireline carriers that have self-deployed their own facilities. The comments demonstrate that the Bells have used their monopoly control of last-mile facilities to squelch potential competition in the market for wholesale special access facilities,[97] a finding confirmed by the Commission's recent determination that CLECs are impaired without access to high capacity loop and transport elements in the overwhelming majority of markets in the United States.[98] Even cable companies, which the ILECs falsely portray as "dominant" broadband providers, cannot match the ubiquity of the ILEC's special access facilities, and themselves are generally dependent, like other competing carriers, on the ILECs for the last-mile, high-capacity transmission facilities needed to provide special access services to end users.[99] Thus, except in rare instances, non-affiliated broadband providers cannot turn to competitive LECs to reach customers.

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[95] *See, e.g.*, AT&T at 42; FDN at 18; ITAA at 7; Local Government Coalition at 16; Vonage at 13.

[96] Vonage at 14.

[97] *See, e.g.*, FDN at 20-21; ITAA at 16-17; Time Warner at 13-14.

[98] *FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers*, Press Release, WC Docket 04-313, CC Docket 01-338, rel. December 15, 2004 at 1-2; Separate Statement of Chairman Michael K. Powell at 1. Even the Bells' arguments regarding the Commission's impairment findings are largely based on their assertion that the availability of *ILEC-provided* special access services (not competitively provided wireline facilities) is sufficient to overcome impairment.

[99] *See, e.g.*, Time Warner at 9-10, 13-14.

BellSouth's data regarding Frame Relay and ATM services are misleading and not determinative - The non-ILEC commenters also show that the ILECs' claims[100] about market share in "downstream" markets for retail high capacity services such as Frame Relay and asynchronous transfer mode ("ATM") are irrelevant.[101] The ILEC claims paint a false picture of the high-capacity data services market by focusing almost exclusively on two limited segments of that market -- the segments for interLATA ATM and Frame Relay services. But the high-capacity data services market is, of course, in fact comprised of *both* the interLATA high-capacity services segment, which includes interLATA private line, ATM, Frame Relay, and other services, *and* the local (intraLATA) markets for private line, ATM, Frame Relay, and other high-capacity services. The ILECs' claims regarding high-capacity market share utterly ignore the fact that the ILECs retain a virtual monopoly over last-mile special access transmission -- which is an essential input to private line, ATM, Frame Relay, and all other high-capacity services, in *both* the intraLATA *and* interLATA high-capacity markets. Indeed, the record is clear that, at a minimum, ILECs have (i) abused the market power generated by their last-mile special access monopoly in both the local and long distance markets for high capacity services,[102] (ii) forced competitors to abandon markets for high capacity

[100] *See*, *e.g.*, Verizon at 1-2.

[101] *See*, *e.g.*, FDN at 20-21; ITAA at 16; Time Warner at 15-17.

[102] In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Decl. of Benway, Holleron, King, Lesher, Mullan, and Swift, ("Benway Decl.")(filed October 4, 2004) ¶¶ 79-103.

local data services such as local private line and Ethernet,[103] and (iii) imposed price squeezes on potential rivals that make the competitive provision of high capacity local Frame Relay services impossible for all practical purposes[104] and the competitive provision of high capacity interLATA Frame Relay services increasingly so.[105] At bottom, the myopic ILEC claims concerning certain retail high capacity services is yet another attempt to divert the Commission's attention by focusing on limited segments of "downstream" retail markets, while ignoring the wholesale monopoly power that ILECs enjoy over necessary "upstream" inputs.[106]

The comments thus confirm that non-affiliated broadband providers remain critically dependent upon incumbent LECs and their last-mile high-speed transmission facilities to provide their own high-speed services. This, in turn, requires continued enforcement of Title II and the *Computer Inquiries* rules. Without their continued application, there is no likelihood that non-affiliated providers would be able to obtain access to those critical functionalities on just, reasonable and non-discriminatory terms -- the core requirements of sections 201(b) and 202(a) in Title II and the *Computer Inquiries* rules. And if non-affiliated providers are unable to obtain such wholesale access, they cannot provide any check on the ILECs' duopoly (and often monopoly) power over the retail market, to assure that their retail offerings will be offered to end users on just, reasonable and non-discriminatory terms and conditions. As a result, there

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[103] Id. ¶¶ 98-103.

[104] Id. ¶¶ 87-88.

[105] Id. ¶¶ 87-89.

[106] *See, e.g.*, Time Warner at 16.

is no way that the Commission could reasonably find that granting BellSouth's Petition complies with the mandatory requirements of section 10(a)(1).

The ILECs' data on retail competition do not support forbearance - To the extent that the Commission considers data on retail competition in this proceeding, the comments confirm that ILECs have continually used their monopoly control over last-mile broadband facilities to artificially constrain competition and harm competitors and competition in the retail markets for both large business (*i.e.*, enterprise) and mass-market (*i.e.*, residential and very small business) customers. As a result, there is no reasonable basis upon which to find that continued enforcement of the Title II and *Computer Inquiries* requirements is unnecessary to assure the continuation of just, reasonable and non-discriminatory rates and terms even in these retail markets.

Large business customers - The comments show that the ILECs' control over bottleneck special access facilities enables ILECs to leverage their power into the provision of retail data and even long distance services for large business customers. The evidence shows that ILECs have proven only too willing to use that power to manipulate their special access rates in ways that make it virtually impossible for rival carriers to compete,[107] and also to hamper rivals with poor quality interconnections and unnecessary delays.[108] The comments confirm that ILECs dominate the provision of broadband special access services,[109] and that this Commission has especially recent evidence that

[107] *See, e.g.*, AT&T at 38-40; ITAA at 6; Time Warner at 16-17.

[108] *See, e.g.*, AT&T at 38; Time Warner at 13-14.

[109] *See, e.g.*, AT&T at 38-39; FDN at 20-21; ITAA at 16; Time Warner at 8-10.

BellSouth itself will discriminate in the provision of wholesale telecommunications services to rival firms that compete against them in "downstream" markets.[110]

Given the ILECs' continuing pattern of anti-competitive activities -- and the lack of any market-based wholesale alternatives for competitors -- any suggestion that completely de-regulated "private carriage" agreements are sufficient to maintain an "open network" in *any* downstream broadband market is nothing short of absurd.

Mass market customers - Despite BellSouth's inferences (but no direct proof), the comments show that there is almost no "intermodal" competition in the provision of retail broadband services to small businesses.[111] And even in the consumer retail market, BellSouth would have the Commission believe -- incorrectly -- that cable and DSL compete head-to-head throughout the entire nation without exception. But the fact is that many residential customers do not even have access to cable modem Internet access services.[112] BellSouth also asks the Commission to believe on faith that satellite and wireless services will check the ILECs' retail dominance. Again, the reality is the complete opposite. The evidence is that consumers do *not* view these services as a serious alternative to the Bells' DSL service.[113] Specifically, the comments show that, even on a *combined* basis, these platforms have a *de minimis* share of the broadband

[110] *See, e.g.*, AT&T at 39; ITAA at 16; Time Warner at 17.

[111] *See, e.g.*, AT&T at 41; FDN at 17; ITAA at 6 & n.14; Time Warner at 11-12; Vonage at 17.

[112] *See, e.g.*, AT&T at 41; FDN at 17; Vonage at 19.

[113] *See, e.g.*, California ISPs at 6; EarthLink at 20-21; FDN at 17-18; FISPA at 39-44; ITAA at 7.

services market and that small share is in fact *declining.*[114] Moreover, BPL is so new and unproven in consumer applications that it does not even have a measurable market share.[115] Given the acknowledged failure of fixed wireless applications described above, these options are obviously inadequate to constrain the ILECs' real-world market power. Thus, there is no evidence upon which the Commission could reasonably conjecture that there is anything more than a duopoly -- if that -- over the provision of retail broadband information services to the mass market. And it is obvious that the mere existence of a duopoly is insufficient to support the elimination of key market-leveling safeguards.

B. The Petition Does Not Meet the Requirements of Sections 10(a)(2) or 10(a)(3)

The comments also confirm that BellSouth has not satisfied Sections 10(a)(2) or (3), which require it to demonstrate that enforcement of the Title II and *Computer Inquiries* requirements are not necessary to protect consumers and that forbearance would promote the public interest by promoting competition. As explained above, the comments irrefutably demonstrate[116] (i) that ILECs such as BellSouth possess monopoly control over "key inputs" that non-affiliated broadband providers need in order to be able to offer competitive retail information and advanced services, (ii) that the ILECs have the incentive to discriminate against rivals and impede competition in such downstream markets, and (iii) that the ILECs will in fact do so unless they are subject to appropriate regulation. Thus, continued enforcement of Title II and *Computer Inquiries* non-

[114] *See, e.g.*, AT&T at 42; FDN at 18; FISPA at 43-44; Vonage at 13.

[115] *See, e.g.*, AT&T at 42; FDN at 18; ITAA at 7; Vonage at 13.

[116] *See*, *e.g.*, California ISPs at 6-7; CompTel at 13; Local Government at 15; MCI at 3; ITAA at 6-7, 16; Vonage at 14-15.

discrimination obligations is essential to limit BellSouth's ability to discriminate against non-affiliated broadband providers, in order that consumers may access competitive broadband services, content and capabilities based on *their* preferences, not the ILEC's.

The comments further show that BellSouth's specific claims of "regulatory burden" are simply wrong. First, as AT&T showed (at 44-45), BellSouth's principal "cost" -- the purported need to create and maintain a separate, redundant "network," replete with redundant personnel and extraordinary infrastructure -- is imaginary. BellSouth is not required to maintain a separate subsidiary for its information services, so its additional costs to do so are voluntary. Second, another principal claim in the Petition is that the *Computer Inquiries* rules delayed BellSouth's efforts to offer a DSL access service that it believed ISPs wanted and needed. But contrary to BellSouth's claims, the comments showed that independent ISPs were *not* deprived of the EUA DSL service by the *Computer Inquiries* rules. To the contrary, independent competitors *resisted* purchasing BellSouth's EUA DSL service for two years, because they never wanted the service in the first place.[117] That is because the EUA service offered lower quality (a higher latency) than existing products, and it did not allow competitors to seamlessly deploy virtual private network ("VPN") and VoIP services.[118] Indeed, the *only* reason that independent ISPs eventually adopted the service *is* because BellSouth manipulated the prices for its DSL offerings so as to force the ISPs to accept it.[119] Thus, contrary to BellSouth's claims, the record shows that the tariffing and other requirements (including

[117] *See* C-N-S Internet ¶¶ 10-11.

[118] *See id* ¶ 11.

[119] *See id*.

complaint processes) of the *Computer Inquiries* and Title II are eminently reasonable and necessary mechanisms to protect independent ISPs from ILEC abuses.

The comments also debunk BellSouth's claim that *Computer Inquiries* rules prevent it from developing "tailored" offerings for ISPs.[120] The prohibitions against discrimination do not preclude BellSouth from making "customized" deals, including the ability to develop offers such as its Regional Broadband Aggregation Network ("RBAN") service, as long as they make all such offers reasonably available to similarly situated customers and comply with the requirements of Section 252 of the Act.[121] Moreover, to the extent any such rules did exist, the answer would *not* be to scrap the core *Computer Inquiries* non-discrimination obligations, but instead to modify the Commission's rules so that BellSouth could offer contract tariffs.[122]

The commenters also demonstrate that BellSouth may not buttress its meager showing by arguing that the granting the Petition would provide ILECs with enhanced incentives for broadband investment.[123] The plain language of Section 10(a) bars the Commission from balancing the *certain* competitive harms that would result from deregulating a dominant company with market power that controls essential access facilities against the speculation that such deregulation might increase the dominant carrier's investment incentives. More specifically, Section 10(a) requires three *conjunctive* showings, and the first two, *i.e.*, that enforcement of the regulation at issue is

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[120] Petition, Fogel Decl. at 2-5.

[121] *See*, *e.g.*, CompTel at 15; FDN at 37; Vonage at 23.

[122] *See*, *e.g.*, AT&T at 47; Vonage at 23.

[123] *See*, *e.g*, AT&T at 46; Local Government Coalition at 5; MCI at 9-10.

not necessary to ensure just, reasonable and non-discriminatory rates and conditions and that enforcement is not necessary to protect consumers, are *absolute*; they do not permit balancing.[124] Nor does Section 706 alter this analysis. The Bells themselves have acknowledged that section 706 is not "an *independent* source of forbearance authority."[125] Thus, section 706 plainly does *not* authorize the Commission to rewrite section 10(a) to trade off irrefutable anticompetitive risks that result from the existence of ILEC market power against possible ILEC investment incentives.

Nor has BellSouth, or any other ILEC, remotely justified its claim that the so-called public interest in "regulatory parity" requires the relief requested in the Petition. The comments confirm AT&T's showing (at 32) that cable and ILECs possess very different networks with very different characteristics.[126] First, the Bells' networks were designed for, and have always been operated to provide, point-to-point common carrier communications, and the Bells and other incumbent LECs have for decades been required to provide equal and non-discriminatory access to all consumers, interexchange carriers and ISPs. As a result, there are well-established systems, processes, and rules in place for accomplishing that objective in a commercially viable manner.[127] Thus, continuation of non-discrimination requirements for ILECs does not create technological

[124] *See, e.g.*, AT&T at 47-48; EarthLink at 30; FISPA at 52; MCI at 9-10; Vonage at 23.

[125] *See* WC Docket No. 04-29, Petition of SBC, at 11-12 (emphasis in original); *see Triennial Review Order*, 18 FCC Rcd. 16978, ¶ 176 (2003) (section 706 grants the Commission no "independent" authority) (citing precedents).

[126] *See, e.g,* ALTS at 5; FISPA at 31-33; ITAA at 14; Local Government Coalition at 15.

[127] In fact, DSL-based services are not materially different from older "pair gain" technologies and have long been provided on a common carrier basis over the very same wires as voice and other traditional common carrier services. *See, e.g.*, CC Docket No. 02-33, Comments of AT&T, Chandler Decl. at ¶¶ 24-36 (filed May 3, 2002).

or operational risks. Instead, it merely ensures that these companies do not exploit their market power to skew the provision or pricing of services or to discriminate against customers in either wholesale or retail markets. Continuing the *status quo* and requiring BellSouth and other ILECs to offer basic broadband telecommunications services on a common carrier basis thus raises no possible network or service reliability/viability concerns. In contrast, cable systems were established for a different purpose, *i.e.*, to provide point-to-multipoint video programming, and there are no established systems or processes that support comparable wholesale access to cable facilities.[128]

Second, there are important legal differences between cable companies and incumbent LECs. Congress specifically rejected the use of a common carrier approach in Title VI of the Telecommunications Act, which covers cable services. In stark contrast, Title II and the Commission's regulations have always required incumbent LECs (and all other telecommunications carriers) to provide competitors nondiscriminatory access to their networks in order to introduce and sustain competition in formerly monopoly markets.[129] Indeed, the Supreme Court expressly held that the "provisions of the Telecommunications Act [of 1996] . . . were intended to *eliminate the monopolies* enjoyed by the inheritors of [the Bell System's] local franchises; this objective was considered both *an end in itself* and an important step toward the Act's other goals of

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[128] *See, e.g.*, FISPA at 31-33; ITAA at 13-14; Washington ISPs at 26-27.

[129] *See, e.g.*, 47 U.S.C. §§ 201, 202, 251, 252; Final Decision and Order, Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Service and Facilities, 28 FCC 2d 267 (1971) ("*Computer I")*; *Computer II*; *Computer III*.

boosting competition in broader markets and revising the mandate to provide universal service."[130]

Third, the competitive situations facing cable companies and ILECs in their core markets are significantly different. Unlike the ILECs, cable operators face vigorous competition in all of the businesses in which they compete, especially their provision of core video programming services. There are thus clear justifications for the very different legal regimes Congress established under Titles VI and II, and principled application of the "same analytical framework" supports the adoption of different rules for cable and telephone-delivered broadband services.[131]

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[130] *Verizon Communications, Inc., v. FCC*, 122 S.Ct. 1646, 1654 (2002) (emphasis added).

[131] As AT&T has previously explained (at 33 & n.75), the Commission's decision the *271 Forbearance Order* does not support BellSouth's request. *See* Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), Memorandum and Order, WC Dkts. Nos. 01-338 et al. (rel. October 27, 2004) ("*271 Forbearance Order*"). And the ILECs' reliance on the *271 Forbearance Order* is misplaced for additional reasons. By its express terms, the *271 Forbearance Order* granted circumscribed forbearance relief to BOCs from (i) Section 271 unbundling requirements for (ii) a very limited set of new fiber network facilities (i.e., fiber to the home ("FTTH") loops, fiber to the curb ("FTTC") loops, packetized functionality of hybrid loops, and packetized switching) that (iii) were to made available as Section 271 elements to requesting carriers (e.g., CLECs) seeking to use the elements to provide competing regulated telecommunications services. *271 Forbearance Order*, ¶¶ 6, 21. Under the circumstances particular to that forbearance request, including the potential disincentive effect of facilities unbundling on BOC investment in new fiber facilities, the Commission granted relief limited to the unbundling of those specific facilities as network elements under section 271. Id. ¶ 21. Such relief (improvident as it was) is far different from the relief BellSouth seeks here. (*See 271 Forbearance Order*, Statement of Commissioner Abernathy (expressly noting that the order has no impact on the application of the Commission's *Computer Inquiries* rules)). Here, BellSouth requests the right to deny *non-affiliated ISPs* (as opposed to requesting telecommunications carriers) access to critical underlying basic transmission *services* (as opposed to network

(footnoted continued on next page)

IV. CONCLUSION

For the reasons set forth above, the Petition should be denied.

Respectfully submitted.

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(footnote continued from previous page)

elements) that BellSouth provides as inputs to its affiliate's unregulated information services offered to end users. The core Title II and the *Computer Inquiries* obligations require BellSouth make available to non-affiliated ISPs and other broadband providers those basic telecommunications services that it is choosing to make available to its affiliates. These non-discrimination obligations do not impose any costs that may be related to the "unbundling of network elements" under the Telecommunications Act, and in fact they pre-date that Act by many years. These obligations are so basic to the functioning of a competitive market that the Commission has never lifted them from *any* carrier. *See, e.g.*, FISPA at 25. The ILECs offer no legitimate reason why the Commission should do so here.

CERTIFCATE OF SERVICE

I hereby certify that on this 28th day of January, I caused true and correct copies of "AT&T's Reply Comments to Petition for Forbearance of BellSouth Telecommunications, Inc." via electronic mail on the parties listed on the attached service list.

Dated: January 28, 2005

/s/ Tracy Rudnicki
Tracy Rudnicki

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